Supreme Court, U. S.
FILED
JUN 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1942

LEE P. BROWN, Commissioner of Public Safety, City of Atlanta,

Petitioner,

v.

JAMES G. MINTER, JR.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

Malcolm J. Hall
Attorney for Petitioner
2000 Fulton National Bank Building
Atlanta, Georgia 30303

Tel: 404/658-1150

INDEX

TABLE OF CONTENTS

OPINION BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

REASON FOR GRANTING THE WRIT 7

CONCLUSION 13

TABLE OF CITATIONS

Cases

Booth, et al. v. Mitchell, 179 Ga. 522 (1934) 9
Buck v. Collins, 51 Ga. 391 (1875) . . . 9
Campbell v. United States Civil Service Board, 539 F. 2d 58 (10th Cir., 1976) 12
Department of the Air Force v. Rose, 96 S. Ct. 1592 (1976) 7, 12
Griffin-Spaulding County Hospital Authority v. Radio Station WKEU, 240 Ga. 444 (1978) 8
Houston, et al. v. Rutledge, 237 Ga. 764 (1976) 8
Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977) 11
Northside Realty Associates, Inc. v. Community Relations Commission, 240 Ga. 432 (1978) 8
Peacock v. Retail Credit Company, 302 F. Supp. 418 (N.D. Ga., 1969) 8
Westinghouse Electric Corporation v. Schlesinger, 542 F. 2d 1190 (4th cir., 1976) 12

Statutes

Freedom of Information Act [5 U.S.C. §522 (b)(6)] 11
Georgia Open Records Act (Ga. L. 1959, p. 88; 1967, p. 455; 1970, p. 163) 2, 3, 7, 12

OPINION

Georgia Attorney General Opinion No. 77-56 4

APPENDIX A A.1
APPENDIX B A.4
APPENDIX C A.5
APPENDIX E A.6
APPENDIX F A.7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO._____

LEE P. BROWN, Commissioner of Public Safety, City of Atlanta,

Petitioner,

v.

JAMES G. MINTER, JR.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Georgia entered in the above-styled action on March 6, 1979.

OPINION BELOW

The opinion of the Supreme Court of Georgia is not yet reported, but a copy thereof is set forth in Appendix A hereto. A copy of the Order denying Rehearing on March 28, 1979, is set forth in Appendix B hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 6, 1979. Thereafter, the Supreme Court of Georgia, on March 28, 1979, denied a Petition for Rehearing. This Court's jurisdiction is invoked under Title 28 United States Code §1257(3).

QUESTION PRESENTED

1. Whether it was error for the Georgia Supreme Court to render an opinion compelling the inspection of records within the sphere of the exception to the Georgia Open Records Law (Ga. L. 1959, p. 88, as amended, Ga. Code Ann. §40-2701, Ga. L. 1967, p. 455; 1970, p. 163, Ga. Code Ann. §40-2703) and the disclosure of the same would constitute an invasion of personal privacy, in violation of the First and Fourth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourth Amendments to the United States Constitution are set forth in Appendix C hereto.

STATEMENT

Respondent, the Editor of the Atlanta Journal-Constitution, submitted a request to the Commissioner of the Department of Public Safety for the City of Atlanta for the inspection of records maintained in the ordinary course of business in the Internal Affairs Section of the Atlanta Bureau of Police Services (hereinafter referred to as "Bureau"). In particular, Respondent requested that the Commissioner of Public Safety allow him to inspect the following records pursuant to the Georgia Open Records Act (Ga. Laws, 1959 p. 88, as amended; Ga. Code Ann. §40-2701, et seq.):

> All documents, papers, and records prepared and maintained in the course of the operation of such bureau in or proceeding as described in sub-paragraphs (1), (2), and (3), below, relating to charges of misconduct against or alleged violations of the rules and regulations of such bureau by, any police officer or other employee of such bureau, including, without limitation, all such documents, papers and records which contain or reflect charges, allegations, statements, memoranda, narrative reports, evidence, findings, recommendations, and decisions of other dispositive action, with regard to such investigation or proceeding:
>
> (1) Each such investigation or proceeding which has been concluded within the past two years.

(2) Each such investigation or proceeding in which:

(a) A recommendation as to the disposition of such charges has been made by the administrative hearing panel to the Commissioner of Public Safety more than three months prior to the date of this letter; and

(b) The Commissioner has failed to make a final decision with respect to such recommendation.

(3) Each such investigation or proceeding in which:

(a) A recommendation as to the disposition of such charges has been made by the administrative hearing panel to the Commissioner of Public Safety more than six months prior to the date of this letter; and

(b) The Commissioner has failed to make a final decision with respect to such recommendation.

The Commissioner of Public Safety, acting on the advice of the City Attorney for the City of Atlanta, denied the above described request on the grounds that the requested documents were excepted from the operation of the Georgia Open Records Law, supra. In further response to said request, the Commissioner of Public Safety attached to his written denial of the subject request the Opinion of the Georgia Attorney General No. 77-56 determining that local school boards may lawfully maintain a policy of confidentiality with respect to personnel files.

Respondent filed a petition for a Writ of Mandamus in the Fulton County Superior Court setting forth the above described facts and alleging that he was entitled to inspect the subject records pursuant to the Georgia Open Records Law, supra. Petitioner answered the Respondent's Complaint and admitted that the Respondent made the subject request and that the Petitioner denied the subject request pursuant to the express exceptions to the Georgia Open Records Law, supra. Further, Petitioner denied that the Respondent had any right to inspect the subject records.

On July 7, 1978, a hearing was held in the Fulton County Superior Court, Atlanta Judicial Circuit, for the purpose of deciding whether the Writ of Mandamus should issue. Respondent submitted the deposition of Jimmie Hill, a captain in the Atlanta Bureau of Police Services and who formerly served for a period of one (1) year as Commander of the Internal Affairs Section of the Bureau of Police Services. The Respondent then rested, but offered no evidence with regard to the nature of the interest which would be served, if the public were to have access to the records which are the subject of Respondent's request.

The Petitioner moved to dismiss the Respondent's action on the grounds that the subject records were expressly excepted from the operation of the Georgia Open Records Law. Though the only evidence in the record at that time supported the Petitioner's contention that the subject records fell within the exceptions to the Georgia Open Records Law, the trial court overruled Petitioner's Motion to Dismiss.

Petitioner then offered further testimony of Captain Hill and the additional testimony of Lt. J. T. King, the present Commander of the Internal Affairs Section of the Bureau. The Petitioner then rested.

After hearing oral argument from both parties, the trial court entered an order issuing the Writ of Mandamus, inter alia, providing that:

> The defendant shall therefore permit the plaintiff to inspect, at a reasonable time and place, all documents, records, etc., comprehended by the plaintiff's request, except to the extent that those documents, records, etc., form part of ongoing, active investigations, reveal the identities of actual informers, or fall within an exceptional and necessarily limited category of information maintained in citizen complaint files which contain matter which would invade the privacy of complaining private citizens (sic) if disclosed.

The Petitioner appealed the trial court's decision to the Georgia Supreme Court. The Court, finding for the Respondent, stated on page three of its opinion that:

> "It was not error to deny appellant's motion to dismiss. The trial court's in camera inspection considered whether disclosure was proper under the express exceptions granted under the Act. . . . See Department of the Air Force v. Rose, 425 U.S. 352, 48 LE 2d 11 (1966)."

The trial court, however, made no in camera inspection of the subject records as erroneously asserted by the Georgia Supreme Court. The Respondent, himself, must concur that no in camera inspection was ever made, and indeed stating this fact in Respondent's brief in opposition to Petitioner's Motion for Rehearing submitted to the Georgia Supreme Court.

REASONS FOR GRANTING THE WRIT

1.

THE OPINION OF THE GEORGIA SUPREME COURT COMPELLING THE PETITIONER TO ALLOW THE INSPECTION OF THE SUBJECT INTERNAL INVESTIGATION RECORDS OF THE ATLANTA BUREAU OF POLICE SERVICES IS VIOLATIVE OF THE GEORGIA OPEN RECORDS LAW, AND SUCH DISCLOSURE IS VIOLATIVE OF THE FIRST AND FOURTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Georgia Open Records Law expressly provides that certain records are to be excluded from its operation. The statute provides, "The provisions of this chapter shall not be applicable to records that are specifically required by the federal government to be kept confidential or to medical records and similar files, the disclosure of which would be an invasion of personal privacy." (Emphasis supplied) Ga. Code Ann. §40-2703. The Georgia Supreme Court has adopted the position that competing interests relative to the Georgia Open Records Law must be balanced

in arriving at a decision with regard to whether or not an official of the state must comply with a request made pursuant to the Georgia Open Records Law. Northside Realty Associates, Inc. v. Community Relations Commission, etc., 240 Ga. 432 (1978) Nevertheless, no balancing is required unless the records sought fall within the exceptions to this statute. Moreover, the Georgia Court has considered the Georgia Open Records Law on at least three occasions. Houston, et al. v. Rutledge, 237 Ga. 764 (1976); Northside Realty Associates, Inc. v. Community Relations Commission, etc., 240 Ga. 432 (1978); and Griffin-Spaulding County Hospital Authority v. Radio Station WKEU, 240 Ga. 444 (1978). However, none of the aforementioned cases were presented to the Court in a posture which allowed the Court to review the balancing which must be done once a Georgia governmental entity claims that a request pursuant to the Georgia Open Records Law is excepted from the operation thereof.

The Federal District Court, Northern District of Georgia, has provided a rather thorough and exhaustive analysis of the tort of invasion of privacy as the same is actionable under Georgia law. See, Peacock v. Retail Credit Company, 302 F. Supp. 418 (N.D. Ga., 1969). In sum, the Court concluded, inter alia, that in order to recover damages for intrusion into one's private affairs, the intrusion must have been physical, analagous to a trespass; and that there must be a public disclosure of the embarrassing private facts. Peacock, supra, pp. 422-424.

In the case, sub judice, the Respondent submitted his request both as a private citizen and as an editor of the Atlanta Journal-Constitution. While Respondent offered no evidence to show what interest he was pursuing in order to obtain the disclosure of the subject documents, it can be reasonably assumed that he is seeking to have his reporters inspect the subject documents for the purpose of publishing the same in his newspaper. He seeks to pursue this purpose in spite of the fact that the subject documents contain information relative to citizens who desire that their complaint with respect to the misconduct of a police officer be handled in a confidential manner; the right of police officers against whom substantiated or unsubstantiated charges are preferred to remain silent; the destructive effect that such disclosure would have on the investigative processes employed by the Bureau; and, not less significantly, the First and Fourth Amendment rights of all persons involved in said investigative proceedings to remain free from such a public intrusion into their affairs.

The Georgia Supreme Court has long ago considered the purpose which was urged by the Respondent with regard to the disclosure of the subject documents. In Buck v. Collins, 51 ga. 391 (1875) the court in construing a statute relating to the public inspection of public records of the Clerk of the Superior Court held:

> "The necessities of society and the protection of those dealing with property require that these property records shall exist. That the title to land, the fact that mortgages or judgments exist,

shall be capable of being inquired into by those interested. This is as we have said, a necessity of society, and this necessity begets the necessity for books and records. The character of one's title, and whether one has mortgages or judgments against him, evokes a necessity open to inquiry, and the public, by providing books and records, meets this necessity. Men are required, for the protection of purchasers and to secure fair dealing, to put their titles upon record, and to expose, in some respects, for they may have strong inducements to keep secret. But while the public interest thus provides a mode by which anyone may learn the truth upon inquiry, it is no part of the public scheme to make this exposure universal. It provides that those who seek information can get it, but it does not and ought not to flaunt the information its records contain before the public gaze and thus make a scandal of public necessity. The object of the record is to furnish to those needing it the information the record contains. That object is obtained when it's books are open to inquiries as these occasions present themselves. The object sought by the complaintant, to wit, to put the substance of these records into print, to be sold and put in the hands of anyone who may chance to buy or to borrow is an extension of this publicity beyond the necessities which make the record justifiable, and is

a perversion of the object sought by the requirement to record. It is an unnecessary flaunting of private matters before the public gaze. (Emphasis supplied). Booth, supra, pp. 526 and 527; (Cited with approval in Booth, et al. v. Mitchell, 179 Ga. 522 (1934).

Thus the Georgia Supreme Court determined that even the most public of records should not be indiscriminately open to the public in instances where the information is sought for no specific, legally cognizable reason.

The federal courts have had little difficulty in balancing the interest urged by the Petitioner herein in construing a very similar exception to the Federal Freedom of Information Act. The Freedom of Information Act, supra, specifically excludes, "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.A. ¢552(b)(6). This provision is very much similar to the exclusion of "medical records or similar files, the disclosure of which would be an invasion of personal privacy", as set forth in Ga. Code Ann. ¢40-2703.

In Maroscia v. Levi, 569 F. 2d 1000 (Seventh Circuit, 1977), the court determined that the disclosure of files of the Federal Bureau of Investigation which contained investigative reports of interviews, names of interviewees, third parties, FBI personnel and other law enforcement officials, would be an invasion of privacy.

Likewise, in Campbell v. United States Civil Service Board, 539 F. 2d 58 (Tenth Circuit, 1976), the court held that lists of names contained in an appendix to an intra-agency memoranda and other lists of names of employees of the Civil Service Commission would be an invasion of privacy if supplied by the governmental entity. In Westinghouse Electric Corporation v. Schlesinger, 542 F. 2d 1190 (Fourth Circuit, 1976) the court held that disclosure by a governmental contractor of certain E.E.O. documents relating to its personnel were covered by the subject exception to the Freedom of Information Act.

In a case which is very closely akin to the subject issue, Department of the Air Force v. Rose, 96 S. Ct. 1592 (1976), the Supreme Court of the United States determined that summaries of investigative reports into violations of their honor code by cadets of the Air Force Academy was an invasion of privacy.

It should be noted that the trial court in the case, sub judice, did find that the subject documents were "similar files, the disclosure of which would be an invasion of privacy" as set forth in Ga. Code Ann. §40-2703. This conclusion of law remained undisturbed by the Georgia Supreme Court. However, as exemplified by the above described federal cases construing the Freedom of Information Act, the Georgia court in effecting a balance of the competing interests of which only one interest was offered into evidence, should have determined that the disclosure of the documents which are requested by the Respondent would be an invasion of privacy of the persons as hereinbefore described.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Supreme Court.

Respectfully submitted,

FERRIN Y. MATHEWS
W. ROY MAYS, III
GARY S. WALKER

Attorneys for Petitioner

2000 Fulton National
Bank Building
Atlanta, Georgia 30303
(404) 658-1150

APPENDIX A

In the Supreme Court of Georgia

Decided: March 6, 1979

34397. BROWN, Comr. v. MINTER.

UNDERCOFLER, Presiding Justice.

James G. Minter, Jr., an editor of the Atlanta Journal acting in his capacity as a private citizen, sought to inspect certain records representing completed investigations by the Internal Investigation Unit of the Atlanta Police Department. The Department denied him permission to do so and he brought this action for mandamus in the Superior Court of Fulton County under the Georgia Open Records Act (Ga. L. 1959, p. 88 as amended), Code Ann. §40-2701 et seq. After an evidentiary hearing, the trial court ordered the issuance of the mandamus. It found the records sought were identifiable public records and that Minter had shown he had a clear legal right to inspect them. The court also found the Department had, to a limited extent, carried its burden of showing certain information was prohibited under the exceptions permitted under the Act, i.e., disclosure of information regarding ongoing investigations; the names of informants, and in exceptional and necessarily limited cases, the names of complainants. The trial court arrived at these decisions after hearing evidence and by applying the balancing test set forth by this court in Northside Realty Associates v. Community Relations Commission of the City of Atlanta, 240 Ga. 432, 435 (241 SE 2d 189) (1978). We affirm.

1. "In determining whether allowing the appellants to inspect these records would be in the public interest, the trial court must weigh factors militating in favor of inspection . . . against factors militating against inspection. . . . In this regard, the court must weigh the benefits accruing to the government from non-disclosure against the harm which may result to the public if such records are not made available." Northside Realty, supra; Houston v. Rutledge, 237 Ga. 764, 766 (229 SE2d 624) (1976). We conclude the balancing test set out above was properly imposed and the restrictions against disclosure of certain information in this case appears reasonably tailored to protect the public interest and meet the objections of the Department. We find no error.

2. Appellant's contention that the burden of showing the commissioner had a legal duty to perform under this Act lies upon the plaintiff is incorrect. ". . . [I]f it is found that the appellants have made a request for identifiable public records within the appellee's possession, the burden is cast on the appellees to explain why the records should not be furnished. . . ." Northside Realty, supra; Houston v. Rutledge, supra. (Ingram, J., concurring specially). Cases cited by appellant, i.e., Trussell v. Martin, 207 Ga. 553 (63 SE2d 361) (1951); and City of Decatur V. Fountain, 214 Ga. 225 (104 SE2d 117) (1958) are inapposite.

3. It was not error to deny appellant's motion to dismiss. The trial court's in camera inspection considered whether disclosure was proper under the express exceptions granted under the Act and

permitted the commissioner a discretion to withhold the names of complainants or others where exceptional and necessarily limited circumstances existed constituting a clear unwarranted invasion of privacy. See Department of the Air Force v. Rose, 425 U. S. 352, 48 LE2d 11 (1976).

Judgment affirmed. All the Justices concur.

APPENDIX B

CLERK'S OFFICE, Supreme Court of Georgia

Atlanta, March 28, 1979

Dear Sir:

The motion for a rehearing was denied today: Case No. 34397, BROWN, Comr. v. MINTER.

Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The pertinent provisions of the Fourth Amendment are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX E

40-2701 RIGHT OF PUBLIC TO INSPECT RECORDS

All State, county and municipal records, except those, which by order of a Court of this State or by law, are prohibited from being open to inspection by the general public, shall be open for a personal inspection of any citizen of Georgia at a reasonable time and place, and those in charge of such records shall not refuse this privilege to any citizen.

APPENDIX F

40-2703 EXCEPTION OF CERTAIN RECORDS

The provisions of this Chapter shall not be applicable to records that are specifically required by the Federal Government to be kept confidential or to medical records and similar files, the disclosure of which would be an invasion of personal privacy. All records of hospital authorities other than the foregoing shall be subject to the provisions of this Chapter. All State officers and employees shall have a privilege to refuse to disclose the identity of any person who has furnished medical or other similar information which has or will become incorporated into any medical or public health investigation, study or report of the Department of Human Resources. The identity of such informant shall not be admissible in evidence in any court of the State unless the said court finds that the identity of the informant already has been otherwise disclosed.